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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1624

HARRY DAVIS D/B/A DAVIS MFG. CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1970 (Pet. 3a) and a petition for rehearing was denied April 29, 1970 (Pet. 4a). The petition for a writ of certiorari was filed on May 28,

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the standards laid down in *Roviaro* v. *United States*, 353 U.S. 53, petitioner was entitled to the contents of the informant's report in connection with his motion for suppression of evidence.

2. Whether Treasury agents investigating a taxpayer's tax returns have a duty to give him the warnings of constitutional rights set forth in *Miranda* v. *Arizona*, 384 U.S. 436, when it appears that the taxpayer may be subjected to a criminal prosecution, even though he is not in custody when interrogated.

STATUTE INVOLVED

26 U.S.C. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial petitioner was convicted on three counts of having wilfully attempted to evade income tax for the years 1961 through 1963, in violation of

26 U.S.C. 7201, and on three counts of having wilfully made and subscribed false tax returns for the same years, in violation of 26 U.S.C. 7206(1) (R. 6-10, 943). The court imposed the following sentences (R. 92-93, 955-956): On Count I, three years in prison and $5,000 fine; on Counts II, III, IV and V, three years in prison (to run concurrently with the sentence imposed on Count I) and $5,000 fine on each count; and on Count VI the sentence was suspended and petitioner was placed on probation for two years.

The evidence to support the verdict may be summarized as follows:

During the prosecution years, 1961 through 1963, petitioner operated a textile manufacturing plant, engaged primarily in the manufacture of children's blue jeans (R. 271). Virtually all of his reported income arose from sales made through a factor (R. 290-291). When merchandise was shipped by petitioner to his customers, an invoice would be prepared, entered on a schedule and sent to the factor (R. 273). The invoices were pre-numbered in sequence; even void invoices appeared on the schedule, so that all numbers were accounted for (*ibid.*). The invoices contained instructions to the customers to pay the factor (R. 274). The sales were entered on petitioner's books from the schedules sent periodically by the factor (R. 317, 336). Payment from the factor to petitioner was made by a deposit to petitioner's business bank account at the Republic National Bank in the name of Davis Manufacturing Co.

The bank would send a duplicate deposit slip to petitioner in order to notify him of the amount of money deposited to his credit by the factor. (R. 274-275.) As a result of comparing petitioner's books with the schedules received from the factor, petitioner's accountant was satisfied that all sales had been reported and that virtually all sales were factored (R. 338).[1] The books and tax returns were in agreement, so that if an item of income did not get recorded on the books it would not be reported on the returns (R. 344-347).

The government's proof showed substantial unrecorded and unreported sales of merchandise by petitioner to customers who paid him directly, *i.e.*, without intervention by a factor (R. 397-586). The checks received by petitioner in payment of these non-factored sales were either cashed by him at the Fair Park National Bank or deposited into his personal account at that institution (Govt. Ex. 301). This account did not appear on petitioner's books, and income from sales deposited into that account or cashed at the Fair Park National Bank was consequently not recorded on the books (R. 278, 287, 341-342).

Petitioner's total unreported sales for each year, virtually all of which represented checks cashed or deposited at the Fair Park National Bank, were as follows (R. 616, 626-657; Govt. Ex. 301):

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[1] Occasionally a "sample" invoice would be sent out that was not serially numbered, but those sales represented small samples of merchandise, usually valued at only a dollar or two (R. 287-288).

1961	—	$ 46,712.47
1962	—	83,961.77
1963	—	135,200.93
Total	—	$265,875.17

The proof showed petitioner's reported taxable income, true taxable income and unreported income to be as follows (R. 656-657, 678-685; Govt. Ex. 301):

Year	Reported Taxable Income	True Taxable Income	Unreported Taxable Income
1961	$ 24,194.51	$ 72,823.35	$ 48,628.84
1962	44,667.19	129,328.96	84,661.77
1963	57,330.92	219,105.31	161,774.39
Totals	$126,192.62	$421,257.62	$295,065.00

ARGUMENT

1. There is no merit in the contention (Pet. 7-10) that the defense was entitled to the contents of the informant's report in connection with its pre-trial motion for the suppression of evidence. It is the policy of the law to protect the identity of informants. The informant's privilege is essential for "the furtherance and protection of the public interest in effective law enforcement", and will yield only to a specific showing of need in an individual case, *Roviaro* v. *United States*, 353 U.S. 53, 59; *Rugendorf* v. *United States*, 376 U.S. 528.

In the instant case (as in *Rugendorf*) the petitioner wholly "failed to develop the criteria of *Roviaro* necessitating disclosure * * *" (376 U.S. at 535). The only reason petitioner gives for wanting the informant's report is that the report might have

strengthened the contention made in connection with his motion to suppress evidence that the Treasury agents were searching for evidence to build a criminal case against petitioner as well as a civil case, and that they had a duty to advise him of this fact and failed to do so. Of the five cases relied on for this contention (Pet. 7), all of them district court cases, three have been reversed, one has been expressly overruled, and the other is distinguishable.

Petitioner first relies upon *United States* v. *Prudden*, 305 F. Supp. 110 (M.D. Fla.). The Fifth Circuit reversed that case on April 10, 1970, in *United States* v. *Prudden*, 70-1 USTC, par. 9336 (C.A. 5, No. 28140), finding no fraud or deceit in the conduct of the agents. *Goodman* v. *United States*, 285 F. Supp. 245 (C.D. Calif.), next relied on by petitioner (Pet. 7), is distinguishable from the case at bar, for in that case the taxpayer was affirmatively led to believe that the information which he was giving the Treasury Agents was part of the investigation of another taxpayer. *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Penna.), was reversed (and the order of suppression vacated) by the Third Circuit in *United States* v. *Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873. The fourth case relied upon by petitioner, *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D. N.Y.) was expressly overruled in *United States* v. *Sclafani*, 265 F. 2d 408, 414 (C.A. 2), certiorari denied, 360 U.S. 918.[2] As

[2] It should be noted that the Second Circuit professed to be overruling "*United States* v. *Lipschitz* [*sic*] D.C. E.D. N.Y. 1954, 117 F. Supp. 466" (the opinion granting the hearing

for petitioner's fifth case, *United States* v. *Guerrina*, 112 F. Supp. 126 (E.D. Penna.), the portion of the decision quoted by petitioner (Pet. 7-8) was later reversed by the same district judge. *United States* v. *Guerrina*, 126 F. Supp. 609, 610-611 (E.D. Penna.).[3]

Indeed, the federal appellate courts have uniformly held that when an examination by Treasury agents for the purpose of determining civil tax liability takes on criminal aspects, it is not necessary that the taxpayer be so warned. *United States* v. *Sclafani*, 265 F. 2d 408, 414-415 (C.A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Prudden*, *supra*; *United States* v. *Achilli*, 234 F. 2d 797, 805-806 (C.A. 7), affirmed, 353 U.S. 373; *United States* v. *Burdick*, 214 F. 2d 768, 773-774 (C.A. 3); *Turner* v. *United States*, 222 F. 2d 926, 930-932 (C.A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Frank*, 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Montgomery* v. *United States*, 203 F. 2d 887,

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on the motion to suppress), but from the reference to *Gouled* v. *United States*, 255 U.S. 298, and the entire context it is clear that the Court actually overruled *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D. N.Y.) (the opinion granting the motion to suppress).

[3] *United States* v. *Kordel*, 397 U.S. 1, relied upon by petitioner (Pet. 8-9), furnishes no support for his contention. That case holds merely that where a civil proceeding *in rem* is brought against two products of a corporation, corporate officers who fail to claim their privilege against self-incrimination when answering interrogatories cannot later complain when their testimony is used against them in a criminal proceeding. This Court in *Kordel* specifically noted that the question raised by petitioner was not before it.

892-893 (C.A. 5); *Scanlon* v. *United States*, 223 F. 2d 382, 384-385 (C.A. 1); *Biggs* v. *United States*, 246 F. 2d 40, 44 (C.A. 6); *Zacher* v. *United States*, 227 F. 2d 219, 225-226 (C.A. 8), certiorari denied, 350 U.S. 993.

In the instant case disclosure of the informant's report could do nothing more than strengthen petitioner's argument that the Treasury agents were looking for evidence of criminal wrongdoing from the outset, as well as conducting a civil tax investigation. Since it would avail petitioner nothing to establish such an argument, it follows that petitioner has not satisfied the criteria of *Roviaro* and that the informant's privilege must prevail.

2. There is no substance in the argument (Pet. 10-12) that the Treasury agents were required to give petitioner the full warnings of his constitutional rights set forth in *Miranda* v. *Arizona*, 384 U.S. 436. Since petitioner was not in custody nor otherwise deprived of his freedom in any significant way, at the time he made the incriminating admissions and turned over the incriminating records, and since—as the court below found (Pet. 2a)—when the agent "discovered some evidence of possible criminal action, he notified the [petitioner] that he had better get a lawyer and that he (the agent) was turning the matter over to a 'special agent.'", the requirements of *Miranda* did not apply. This is in accordance with the rule in the Fifth Circuit, *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824, and in seven other circuits, *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A.

1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *United States* v. *Miriani*, 422 F. 2d 150, 153-154 (C.A. 6), certiorari denied June 22, 1970, No. 1546, this Term; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

Petitioner contends that these holdings, including the one in the case at bar, are in conflict with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). In *Dickerson*, a prosecution for wilful failure to file income tax returns, where the taxpayer had been given no warnings by the special agent, the court upheld (2-1) a suppression order on the ground that a taxpayer must be given *Miranda* warnings "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division" (p. 1117). In the case at bar the agent warned petitioner to get an attorney as soon as it appeared that the case had criminal potential. But in *Dickerson* the court made its holding applicable only to "interrogations taking place after the date of this decision," July 28, 1969 (p. 1117), so it would in no event control this case in which the evidence was obtained by the agents in 1964.

In view of the purely prospective nature of the *Dickerson* holding and the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first inter-

viewed by a special agent,[4] there should be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See, *e.g.*, *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909. The conflict, therefore, does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE, 1970.

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[4] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476. Petitioner refers (Pet. 11, n. 8) to a previous instruction to special agents, publicized on October 3, 1967, under which the warning was given at a later stage of the investigation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 195

HARRY DAVIS, d/b/a DAVIS MFG. CO., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. Whatever justification the Solicitor General may have found for the course by which he elected to answer Point 1 of the petition, we respectfully submit that he has rendered the Court a disservice. He elected to challenge the authority of five district court decisions cited by petitioner for the legal premise that "conducting a criminal tax investigation behind the facade of a civil audit violates the Constitution and warrants exclusion of evidence directly or indirectly obtained." (Pet. Br. 7). The narrow question presented in Point 1, based on that premise, is whether petitioner, in order to show that he had indeed been subjected to such

a cloaked criminal investigation, was entitled to disclosure of the informer's "tip" which instigated the investigation.

There is, of course, no excuse for omitting from a citation of a case any subsequent history which reference to the Shepard Citator would reveal. Petitioner's counsel apologize to the Court and the government, therefore, for having failed to indicate as to *United States* v. *Guerrina,* 112 F. Supp. 126 (E.D. Pa. 1953), that in a subsequent opinion, 126 F. Supp 609 (E.D. Pa. 1955), the court modified its view (albeit in a manner here immaterial) to say that the circumstances of the investigation made a factual issue, rather than the allegedly tainted evidence being inadmissible as matter of law.

As for the reversal of *United States* v. *Prudden,* 305 F. Supp. 110 (M.D. Fla. 1969), by the Fifth Circuit on April 10, 1970, 70-1 U.S.T.C., par 9336, it had not been either reported in the Federal Reporter system or noted in Shepard when the petition was prepared and filed. Moreover, the Fifth Circuit, even in reversing, recognized "that fraud, deceit, or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable."

The reversal of *United States* v. *Wheeler,* 149 F. Supp. 445 (W.D. Pa. 1957), inexplicably seized upon by the Solicitor General, was properly noted in the petition and was correctly described as being upon other and immaterial grounds.

Goodman v. *United States* , 285 F. Supp. 245 (C.D. Calif. 1969), while it may be distinguisable on the facts, nonetheless follows the premise for which petitioner cited it.

The Solicitor General's assertion that the fifth of the cited decisions, *United States* v. *Lipshitz,* 132 F. Supp. 519 (E.D. N.Y. 1955), was expressly overruled simply is not true. Moreover, the Solicitor General himself has recently acknowledged and cited to this Court the continuing viability for the purpose here cited, of both the *Lipshitz* case and *United States* v. *Guerrina, supra.* At page 32 of his brief in *United States* v. *Kordel,* 397 U.S. 1 (1970), the Solicitor General, propounding to the Court the same premise here relied on by petitioner (see Pet. Br. 8), cited "*United States* v. *Parrott,* 248 F. Supp. 196 (D.D.C.) and cases cited therein." Two of the cases principally cited and discussed in *Parrott* are *Lipshitz* and *Guerrina,* in the exact context here involved and without qualification on their cogency. And this Court itself in *Kordel* (397 U.S., at 12, n. 24) cited both of these cases.

Whatever guilt petitioner's counsel must bear for incomplete statement of the subsequent history of some of the authorities they cited, we submit that it is far more significant both to this case and to the business of this Court generally, that the Solicitor General, without the candor which the Court has properly grown accustomed to expect from him, here takes a position contradictory to that he so recently espoused to the Court in *Kordel.*

2. On the issue of *Miranda* warnings, the fact that *United States* v. *Dickerson,* 413 F.2d 1111 (7th Cir. 1969), applies prospectively does not eliminate the conflict between circuits. Nor does the internal policy of the Service finally resolve the issue, for it is a question of constitutional law, not administrative convenience. This significant conflict persists and it deserves review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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